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CRIMINAL LAW — INSTRUCTIONS TO JURY — REASONABLE DOUBT—JUROR'S INDIVIDUAL DUTY.—*State* v. *Howell* (Supreme Court of Montana, October 21, 1901), 66 Pac. 291.—The above case raises again a question which has come up a number of times for decision, and which has not received by any means a uniform answer from the courts. It is this, "Is a court bound to instruct a jury in a criminal trial that if a single juror has a reasonable doubt of the defendant's guilt, he must act upon his own judgment and not surrender his own conviction, unless convinced."

In the case quoted Howell was indicted for murder. His counsel presented to the court a point for charge, as follows: "You are instructed that your verdict must be unanimous, and that each juror should decide upon his oath, from the law as given to you by the court and the evidence in the case, as to what his verdict should be. No juror should yield his deliberate, conscientious convictions as to the guilt or innocence of the defendant, either at the instance of the majority of the jury for the sake of unanimity, or to prevent a mistrial, but you are further

instructed that nothing in this instruction is to be taken to mean that you shall not fully and fairly discuss among yourselves all the evidence and facts surrounding the case, as disclosed by the evidence or that any of your number shall not be open to conviction by fair, honest argument, by any member or members of the jury, founded upon the evidence produced on the trial and the law as given you by the court."

This instruction the court refused to give. The jury found a verdict of guilty. A new trial was refused, and the action of the trial court was affirmed by the Supreme Court, by a decision of two to one, Milburn, J., delivering a dissenting opinion.

The majority of the court deals with this question shortly as follows: "If in this particular case the court was in error in refusing to submit the instruction requested, it must necessarily follow that a court should instruct the jury as to their individual duties in all cases when requested, or else we must conclude that it was error in the court to refuse to submit the instruction requested in this case merely because counsel for the defendant was of opinion that the jury required it. As was said in *State* v. *Hamilton,* 57 Iowa, 596, 'A jury need not be advised of so simple a proposition. The usual method of instructing upon the measure of proof required in criminal cases is sufficient.' "

Milburn, J., in his dissenting opinion, calls attention to the fact that it is undenied that the instruction, as put, expresses the law, and could not have been the ground for a reversal if the trial court had seen fit to give it, but states that the question here is whether the refusal to give it was error, in view of the fact that nowhere else in the charge of the court was there any statement of the individual and separate responsibility of each juror. He then adverts to the danger incident to allowing the jury to act without adequate instructions as to their individual duty.

The authorities seem to be divided on the point at issue. The older authorities, such as *Commonwealth* v. *Tuey,* 8 Cush. 1 (1851), seem, by implication at least, to be authorities in favor of the majority opinion in the principal case. In *Commonwealth* v. *Tuey,* as justly remarked by Milburn, J., in his dissenting opinion in the principal case, the doctrine of mutual concessions was pushed "to such an extent and in such language that, . . . the average juror would be convinced that he had no right to think his own thoughts if his views were opposed by those of eleven others." The instruction there was, "If much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one, which makes no impression on the minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath."

This language was approved by the Suprme Court of Massachusetts. In *State* v. *Smith,* 49 Conn. 376 (1881), the trial court refused to charge that "each juror in this case must be governed by his own judgment, founded on the law and the evidence, and must not be governed, controlled or influenced by the judgment or opinions of others in agreeing to a verdict." The Supreme Court, in refusing a new trial, substantially quoted the language of the Tuey case and cited it as authority.

In *State* v. *Rohrbacher,* 19 Iowa, 154 (1865), the instruction asked was: "If any *one* of the jury entertain a reasonable doubt as to the sufficiency of the proof to establish any one material averment in the indictment, you must give the defendant the benefit of such doubt and (acquit the defendant)." The trial court modified this by striking out the words in brackets. The Supreme Court say of this instruction: "As asked, it was clearly objectionable. Such a proposition would entitle a party to an *acquittal* if any *one* juror entertained a reasonable doubt upon any material averment. It is a reasonable doubt entertained by the *jury,* and not any *one member* thereof, that justifies an acquittal."

And in *State* v. *Hamilton,* 57 Iowa, 596, where a substantially similar request was made and refused, the court say: "Of course each juror is to act upon his own judgment. He is not required to surrender his convictions unless convinced. He may be aided by his fellow-jurors in arriving at the truth, but he is not to find a verdict against his judgment merely because the others entertain views different from his own. But a jury need not be advised of so simple a proposition. The usual method of instructing upon the measure of proof required in criminal cases is sufficient." The inquiry seems pertinent, if this be the law, why should not the juror be told so? If, as we know, very slight matters tend to mislead a juryman as to his duty, can it be possible too clearly to define that duty? Is it, after all, something that is "so simple" that he may be expected to know it *a priori?* In this case *State* v. *Rohrbacher* (*supra*) was sited as authority, but it is submitted that the vice of the instruction asked in that case was that it demanded an *acquittal* in case of disagreement by a single juror, which is admitted on all hands to be unsound.

In *State* v. *Hurst,* 23 Mont. 484 (1899), such an instruction was asked and refused. The refusal was sustained apparently on several grounds. The Supreme Court thought that it had been practically given in the general charge to the jury. They also thought that the trial court should be allowed a discretion as to whether it should or should not give such instruction. They admitted that the instruction properly stated the law, and that the giving of it would not have been error, but said that, in view of the trial judge's discretion in the matter, and the fact that it had been substantially given in other words, its refusal was no

error. Milburn, J., who dissents in the present case, concurred in the opinion in the case cited, and states that the Hurst case does not rule the principal case.

There are several authorities on the other side. For instance, in *Castle* v. *State,* 75 Ind. 146 (1881), where the defendant was tried and convicted for assault and battery with intent to murder, he asked an instruction stating the general doctrine of reasonable doubt as applicable to the jury as a whole, and closing as follows: "or, if any one of the jury, after having duly considered all the evidence and after having consulted with his fellow-jurymen, should entertain such reasonable doubt, the jury cannot, in such case, find the defendant guilty." This instruction was refused.

The Supreme Court say, "Upon looking through the well-prepared charges given by the court, we do not find the idea embodied or stated in them, that each juror must be satisfied by the evidence of the defendant's guilt, before a conviction can be had, except as it may be involved in the charge that the jury generally must be so satisfied. The proposition embodied in the charge asked . . . is correct in point of law. We think, notwithstanding the general charge of the court, the defendant had the right to have the charge asked given." The judgment was reversed.

In *State* v. *Witt,* 34 Kas. 488 (1885), an instruction similar to those above quoted was asked to the effect that if one juror entertained a reasonable doubt, "then it is the duty of the jury to acquit the defendant." This instruction was refused, and its refusal held no error. The Supreme Court said that it was not the law that the remaining eleven jurors must yield their deliberate judgments to the doubts of the twelfth juror, and agree to an acquittal. But in the same case defendant requested an instruction to the effect that if any juror after deliberation and consultation should entertain a reasonable doubt, "then the jury cannot find the defendant guilty." This instruction the court also refused. Its refusal was held error, on practically the same grounds as those stated in *Castle* v. *State* (*supra*), though in this case, as in that, the jury were instructed as a whole on the subject of reasonable doubt.

Horton, C. J., dissented on the ground that a general instruction was sufficient; that the jury could not be misled by the mere failure to dwell on the individual juror's duty, and that as defendant had the right to poll the jury, he could ascertain if the verdict was the expression of the conscience of each member thereof. Conceding, therefore, the correctness of the instruction in stating the law, he thought its refusal immaterial, and hence no error.

The latest case taking a view similar to the two last cited is *People* v. *Dole,* 122 Cal. 486 (1898), decided by the Supreme Court of California in banc. In this case an instruction, prac-

tically the same as that requested in the principal case, was asked and refused. This refusal, amongst other errors, was held good cause for the granting of a new trial. The court said: "This is a correct statement of the duty of a juror, and should have been given. If any juror needed an instruction upon this point, it was harmful to refuse it; if no juror needed the instruction, it would have been harmless to give it."

Outside the cases cited the exact question does not seem to have been adjudicated. There seems to be much weight in the argument of the dissenting justice in the principal case, and also in the sentence quoted from *People* v. *Dole* (*supra*).